Re JIMMY ZEE CHIN & ANOR.

[O. C. J. (Whyatt C.J.) October 18, 1956]

[Singapore — Bankruptcy Nos. 217 & 218 of 1954]

Bankruptcy Ordinance (Cap. 11), s. 61 — Proof by creditor — Statutory duty of Official Assignee — Assignment by creditor — Proof by assignee — Jurisdiction of Court — Non-proving creditor.

In 1952 the Asia Construction Co., of which two bankrupts Kho Chong Nee and Zee Chi Mai were partners, was in grave financial difficulties. The firm's only asset was a claim for damages for approximately $170,000 for breach of contract against a building owner, one Mizrahie. In order to meet legal expenses in prosecuting this claim the applicant was approached from time to time until September 1953 for three loans amounting in the aggregate to $35,938 which he made on the understanding that if the claim was successful he should be repaid out of the proceeds in top priority over claims by other creditors whose claims should be paid *pro rata* out of the balance remaining after paying him in full. The concurrence of 31, later 26, and lastly 20 creditors was obtained to this arrangement in connection with loans of $18,250, later $15,000 and finally $2,688 respectively. The claim against Mizrahie was settled for $53,000 and on the partners being adjudicated bankrupt in October 1954 this sum was paid to the Official Assignee.

The applicant, who filed no proof as a creditor in the bankruptcy, claimed that the Official Assignee should be ordered to pay him $35,938 direct out of the assets of the bankrupt; alternatively that he should be substituted for the creditors who had proved their debts in such a way as to ensure that he received his debt in full before the payment of any dividends to the other creditors.

Held: (1) there was no statutory authority to cover the payment sought by the applicant and section 61 of the Bankruptcy Ordinance made it quite clear that the Official Assignee's statutory duty was limited to the distribution of dividends to proving creditors only;

(2) although in a proper case the Court would give leave to an assignee of a debt to place a proof in substitution for that of a creditor in bankruptcy, there was no assignment such as the applicant contended for on the part of the creditors in this case in respect of which the Court could grant such leave.

Motion dismissed with costs.

Cases referred to:—

(1) *In re Iliffe* 51 W.R. 80.

(2) *In re Hills* 107 L.T. 95.

BANKRUPTCY MOTION.

F. R. N. H. Massey for the applicant.

A. W. Ghows (Asst. Official Assignee) for the Official Assignee.

Whyatt C.J. : — The applicant in this case seeks to obtain payment of $35,938 out of the assets of the bankrupt in the hands of the Official Assignee before any payments are made to creditors who have proved in the bankruptcy. The Official Assignee recognises the merits of the applicant's claim but contends that this Court, sitting in bankruptcy and therefore limited in its jurisdiction by the statutory provisions governing bankruptcy proceedings, has no power to make the orders granting the relief sought by this motion.

The facts, so far as they are material, can be briefly summarised. In 1952 the Asia Construction Company, of which the two bankrupts, Kho Chong Nee and Zee Chi Mai were the partners, was in grave financial difficulties. The only asset the firm had was a claim for damages for breach of contract against a building owner, Mizrahie by name, but it was a very important claim as it was for approximately $170,000. The Asia Construction Co., however, did not have the funds to meet the legal expenses involved in prosecuting the claim and therfore in March 1953, one of the partners approached the applicant for a loan for this purpose. The applicant agreed to advance $18,250 on the understanding that if the claim was successful, he should be repaid out of the proceeds in top priority over the creditors' claims and that the claims of the latter should be paid *pro rata* of the balance which remained after paying him in full. The substance of this agreement was communicated to the creditors, 31 in all, in a circular letter dated the 13th March, 1953, and all of them signed it. Unfortunately the initial loan of $18,250 proved insufficient to meet all legal expenses, and two months later, on the 7th May, 1953, the applicant made a further advance of $15,000 to meet additional costs. A second circular letter was sent to the creditors seeking their concurrence to this further advance on the same terms as the original advance, but only 26 out of 31 creditors signed it, later there was yet another advance, on this occasion for a comparatively small amount of $2,688 which was approved *ex post facto* at a meeting attended by 20 creditors on 22nd September, 1953. The total sum thus loaned by the applicant for the purpose of enabling Asia Construction Co. to prosecute their claim for damages for breach of contract against Mizrahie was therefore $35,938. The claim was referred to arbitration, and in September 1953 the arbitrator made an award in favour of Asia Construction Co. of $100,000; this award was later varied by an order of the High Court and eventually the claim was settled for $53,000. Subsequently, in October 1954, the partners of Asia Construction Company were adjudicated bankrupt and this sum of $53,000 was paid to the credit of the debtors' account in bankruptcy. It is out of the money which thus became available in the bankruptcy that the applicant now seeks to be paid the sum of $35,938.

There can be no doubt on these facts that the applicant is a creditor of the Asia Construction Co. for the sum of $35,938, but for some reason which was not explained to the Court he has not proved as a creditor in the bankruptcy. Instead he has put forward a claim in the bankruptcy which falls under two separate heads. First, he claims that the Official Assignee should be ordered to pay $35,938 to him direct out of the assets of the bankrupt; and secondly, in the alternative, that he, the applicant, should be substituted for the creditors who have proved their debts in the bankruptcy, in such a way as to ensure that he receives $35,938 before any dividends are paid to the creditors.

As regards the first head, it is to be remembered that the jurisdiction of the Court sitting in bankruptcy is a statutory jurisdiction and consequently the Court cannot order payments to be made by the Official Assignee out of the assets of a bankrupt to a third party, however reasonable and proper it may seem that they should be made, unless there is statutory authority for doing so. The Official Assignee contended that there was no such authority to cover the payment sought by the applicant in this case and that section 61 of the Bankruptcy Ordinance makes it quite clear that his statutory duty is limited to distributing dividends to creditors who have proved their debts in the bankruptcy. The argument of the Official Assignee is, in my view, clearly sound and accordingly I reject the applicant's claim under this head.

I now turn to consider the alternative ground upon which the applicant puts forward his claim. This is based on what I might call the procedure of substitution whereby a person who is not a creditor is substituted in the bankruptcy for one who is and therefore receives from the Official Assignee the dividends which otherwise would be paid to the creditor. It was laid down in *In re Iliffe*[1] that when a creditor executes a legal assignment of his debt, the assignee may ask the Court to give leave to the Official Receiver to place a proof by the assignee on the file in substitution for that of the creditor in the bankruptcy and the Court will, in a proper case, give leave for this to be done; and in *In re Hills*[2] an equitable assignee was allowed to substitute a proof in bankruptcy for that of the assignor in the same way as a legal assignee was allowed to substitute a proof in *In re Iliffe*[1], *supra.*

Now in the present case the applicant has presented his claim to be allowed to substitute his proof in bankruptcy in a number of different ways. In the motion as originally framed, he asked to be substituted for the creditors who had proved for a sum of $37,365 (subsequently amended to $35,938); later he asked, as an alternative, that he should be substituted for such of the creditors as had proved in the bankruptcy and who did not oppose the motion, "for a part of the sum of $37,365 proportionate to the amount of their respective claims in the bankruptcy to the total claims proved therein;" and finally, during the course of the hearing, he asked that he should be substituted for all the proving creditors (whose total proofs amount to $169,573.92) and that any surplus remaining after paying the applicant $35,938 should be paid to the proving creditors.

The short answer to the last alternative is that there is no evidence whatever to support the view that the creditors ever considered, much less agreed, to transfer the whole of their debts to the applicant and indeed this suggestion was not mooted until almost the close of the applicant's case. The main argument for the applicant on this point, however, was that the creditors, by accepting the conditions in the circular letters of the 13th March and the 7th May and, approving a resolution on the 22nd September, had agreed to assign to the applicant the proceeds of Asia Construction Company's claim against Mizrahie, to the extent of the applicant's advances, namely, approximately $36,000. In order to spell out such an assignment, it is necessary to determine first, who were the assignors, and secondly, what was the subject matter of the assignment. As regards the first point, 31 creditors signed the first circular letter of the 13th March, 26 signed the second circular letter of the 7th May, 20 attended the meeting of the 22nd September, and 19 have proved in the bankruptcy. It is in my view impossible, with a fluctuating body of this kind, to arrive at any firm conclusion as to who were the parties who are said to have been contracting with the applicant over this period. But another and more formidable difficulty arises when one considers the subject matter of the assignment. The claim for damages against Mizrahie was a *chose in action* owned by the Asia Construction Company and not by the creditors of the

Company. It is true the creditors hoped that the *chose in action* would produce moneys which Asia Construction Company would use to liquidate their liabilities to them but all that the creditors themselves owned were the debts owed to them by the Asia Construction Company and they could never have supposed that they would become the owners of the Asia Construction Company's *chose in action* against Mizrahie. The agreement which is said to be embodied in the two circular letters of the 13th March and the 7th May and in the September resolution of creditors cannot therefore be interpreted as an agreement by the creditors to assign this *chose in action* to the applicant. Accordingly, in my judgment, there was no assignment such as the applicant contends for in this case, and consequently the Official Assignee cannot place a proof by the applicant on the file in substitution for the proof of any of the creditors in this bankruptcy. Furthermore, even if it were established that there had been an equitable assignment of this sum of $35,938, I am far from satisfied that the applicant could properly substitute a proof for this sum as that would involve partial substitution and not complete substitution for the proofs of creditors. The applicant was not able to refer me to a case where partial substitution had been approved by the Court, and as the Official Assignee pointed out, it would involve him in embarrassing inquiries and difficulties in winding up a bankrupt estate, if partial substitution were allowed. However, in view of my decision on the other aspects of this case, it is unnecessary to discuss this point further.

I should perhaps mention an argument advanced during the course of the hearing, that the circular letters and the resolution of the creditors should be construed as an agreement to treat the applicant as a priority creditor in the event of Asia Construction Company going into bankruptcy or being unable to pay their creditors in full, and that if this were so, the applicant might have obtained the result he now desires if he had proved as a creditor in this bankruptcy and then asked the Court to make a suitable priority order under section 90 of the Bankruptcy Ordinance. It is, however, unnecessary to pass upon this argument since the applicant has not in fact proved as a creditor in these proceedings. For present purposes, it is sufficient to say that in my judgment the objections taken by the Official Assignee to this application are valid and that it was his statutory duty to take them, whatever he may have thought about the merits of the applicant's claim. In my opinion the Court has no jurisdiction to make the orders sought in this application and accordingly the motion is dismissed with costs.

Motion dismissed with costs.

Solicitors : *Allen & Gledhill.*

REG. v. LIM CHIN SHANG

[A. Cr. J. (Whyatt C.J.) March 8, 1957]

[Singapore — Magistrate's Appeal No. 244 of 1956]

Societies Ordinance (Cap. 228), ss. 15 & 25 — "Insignia" — Tattoo marks not "insignia" within the meaning of the sections — Statutory presumption — Expert evidence — Prima facie case — Rebuttal.

A tattoo mark on a person's body, although it identifies him as a member of a secret society, is not an "insignia" within the meaning of section 15 of the Societies Ordinance so as to raise the statutory presumption thereunder.

Once the prosecution has established a *prima facie* case that the respondent has been identified as a member of a secret society by virtue of certain tattoo marks on his body, the onus is then on the respondent to shew that those particular marks are not the marks of the secret society, or that if they were, he was not aware of that fact when he had them tattooed on his body, or that he was, at one time, a member of the secret society but has now ceased to be such, or to repel the *prima facie* case in any other way he thinks fit.

CRIMINAL APPEAL.

Tan Boon Chiang (Deputy Public Prosecutor) for the appellant.

C. G. Toh for the respondent.

Whyatt C.J. : — This is an appeal by the Crown against a decision of the learned Magistrate acquitting the respondent on a charge of being a member of a secret society known as the 108 Group. Two questions were argued before me on this appeal; first, whether there is a statutory presumption that the respondent is a member of this secret society by reason of the fact that he has 108 Group tattoo marks on his left arm and left hand, and secondly, if there is no such presumption, whether the evidence called by the prosecution was sufficient to establish a *prima facie* case against the respondent of membership of this secret society.